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In the
SUPREME COURT OF THE UNITED STATES

CONNECTICUT DEPARTMENT OF PUBLIC SAFETY, ET AL., *Petitioners*,

v.

JOHN DOE, SAMUEL POE, *Respondents*.

On Writ of Certiorari To The
United States Court of Appeals For The Second Circuit

BRIEF OF THE OFFICE OF THE PUBLIC DEFENDER FOR THE STATE OF NEW JERSEY AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Did the court of appeals correctly hold that Connecticut's sex offender registration and community notification law violates the Fourteenth Amendment by requiring broad community notification which falsely suggests, for each sex offender who is subject to the law, that he is likely dangerous, and by imposing extensive registration requirements which alter the legal status of these persons without affording them notice and a hearing on the question of whether they are dangerous?

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INTEREST OF *AMICUS CURIAE*[1]

This case concerns the constitutionality, under the Fourteenth Amendment of the United States Constitution, of the Connecticut Sex Offender Registry Act. Conn. Gen. Stat. §§ 54-250-261 (2001), *amended by* 2001 Conn. Legis. Serv. 01-84 (West).

In October 1994, acting in response to the sexual assault and murder of a seven-year-old girl, Megan Kanka, New Jersey enacted a sex offender registration and community notification law that came to be known as "Megan's Law." Other states, including Connecticut, and the federal government followed suit. A number of the jurisdictions that enacted these laws adopted due process procedures which afford the persons subject to the laws ("registrants") with notice and the opportunity for a hearing to determine whether, or to what extent, those persons currently pose a risk to the community.

Amicus is an entity which represent registrants in their challenges to the Megan's Law registration and notification proposed for them by the state. *Amicus'* extensive experience with Megan's Law systems, which include due process protections, places *amicus* in a unique position to provide this Court with information concerning

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[1] All parties have consented to the appearance of *amicus curiae* in this matter, and letters of consent have been lodged with the Clerk, pursuant to Supreme Court Rule 37.6. Counsel for *amicus* states that this brief was not authored in any part by counsel for any party. No person or entity other than *amicus* and their counsel made a monetary contribution to the preparation and submission of this brief.

the importance and the efficacy of such procedures.[2] In addition, considering that this Court's ruling could impact the registrants who are represented by the *amicus*, we have a clear interest in presenting the Court with information and arguments that bear upon our clients' constitutional rights.

[2] *Amicus* has lodged with the Court a number of affidavits from attorneys from a number of states who are experienced in the representation of indigent offenders in administrative and court proceedings relating to risk classification and community notification.

SUMMARY OF ARGUMENT

The court of appeals correctly ruled that a sex offender registration and notification law which ignores entirely the important distinctions among sex offenders, and denies those offenders any opportunity to challenge the accuracy of the clear message conveyed by community notification – *i.e.*, that they are currently dangerous – violates the Fourteenth Amendment of the United States Constitution.

Community notification laws typically cover a broad range of offenses and offenders. Within that broad range are offenders who present vastly different levels of risk. A substantial number of persons who have committed a sex offense at some point in their lives present little or no current risk of reoffense.

The experience of the states that have adopted a risk-based approach demonstrates it is possible to rationally categorize offenders according to their relative degrees of risk. Actuarial risk assessment tools are commonly used and may assist in bringing a degree of standardization and uniformity to the process. In many cases, the level of risk presented by the offender is readily apparent.

However, even where standardized risk assessment tools are used, errors frequently occur. It is therefore essential that registrants be provided with notice of a proposed risk classification and the opportunity for a hearing. These requirements can be satisfied without imposing an undue burden on the state.

To summarize, from the perspective of those who

have participated in a system in which community notification is tied to a risk determination, and due process is afforded to ensure that the risk determination is accurate, the "one size fits all" approach that has been adopted in Connecticut and some other jurisdictions is unnecessary and grossly unfair.

ARGUMENT

THE EXPERIENCE OF STATES THAT HAVE ADOPTED A RISK-BASED APPROACH TO COMMUNITY NOTIFICATION, COUPLED WITH NOTICE AND HEARING REQUIREMENTS, DEMONSTRATES THAT THIS TYPE OF APPROACH IS NECESSARY AND PRACTICAL.

A. An Offense-Based Approach Ignores Clear and Dramatic Differences Among Offenders, and Unfairly Stigmatizes Many Offenders Who Present Little or No Risk of Reoffense.

The 1994 murder of a young child by a repeat pedophile who lived across the street sparked a firestorm of public reaction that led to the enactment of sex offender registration and community notification laws in all fifty states and the District of Columbia. Since their inception, these laws have been justified by false or exaggerated claims – which are accepted without hesitation – that sex offenders are "incurable" criminals who are virtually certain to reoffend.[3] These statutes are premised on the assumption that notifying the community of the conviction history of such offenders and their current whereabouts will help to

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[3]Such claims are echoed in a number of inaccurate statements in the briefs filed in support of petitioners in this case and in *Smith v. Doe* (No. 01-729), concerning sex offender recidivism rates. *But see* Brief of the Massachusetts Committee For Public Counsel Services as *Amicus Curiae* in Support of Respondents, and Brief of the Office of the Public Defender of the State of New Jersey, *et al.*, as *Amici Curiae* in Support of Respondents, at 23-24 n.7, filed in *Smith v. Doe*.

prevent additional sex offenses.

Although prompted by the threat posed by a specific type of offender – the repeat-offender pedophile who preys upon children from outside his own home – the notification laws that were enacted cover a broad range of offenses and offenders. They may include everything from less serious offenses that result in a non-custodial sentence, to very serious crimes for which lengthy prison sentences are imposed. Both violent and consensual offenses may be included. Offenses against both children and adults fall within the laws, as do offenses against victims who resided within the offender's own household.[4] In terms of offenders, a one-time offender who has led a law-abiding life for many years may be covered, as is a repeat offender who has just been released from prison. Offenders who express genuine remorse and have spent years of work in treatment are included, along with the offender who shows no remorse or inclination to change. Many states subject juveniles to community notification. United States Department of Justice, Center for Sex Offender Management ("CSOM"), *Community Notification and Education*, at 5 (April 2001).[5]

These differences often translate into levels of risk for reoffense that vary greatly from one offender to another. In many instances, these differences are self-evident – *e.g.*, the just-released unreformed repeat offender

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[4]In Ohio, persons convicted of non-sex offenses are subject to that state's community notification law if the court determines at sentencing that the motive for the offense was sexual gratification. (Lane Dec. ¶ 3.)

[5]This article and other CSOM publications cited in this brief are available at www.csom.org.

clearly presents a much higher risk than the one-time offender who obtained treatment and has remained offense-free for many years. A number of formal studies of sex offender recidivism confirm that rates of recidivism vary greatly among different categories of offenders. *See* CSOM, *Myths and Facts About Sex Offenders*, at 2 (August 2000), (citing various studies and noting: "Persons who commit sex offenses are not a homogeneous group, but instead fall into several different categories. As a result, research has identified significant differences in reoffense patterns from one category to another.").

Recognizing the substantial distinctions among the persons who are potentially subject to community notification, and that failing to distinguish the truly dangerous offenders from the thousands who are very unlikely to reoffend dilutes any public safety benefit to be derived from community notification, many states require that community notification be tied to an offender-specific risk determination.

In the states where community notification is tied to the risk presented, rather than simply to whether the offender has committed an offense covered by the notification statute, some offenders are excluded from notification because it is readily apparent they present no significant risk of reoffense. The registrants exempted from notification may include offenders who committed relatively minor offenses many years ago and have since turned their lives around, or offenders whose current physical condition suggests a greatly reduced risk of reoffense. (*See* Buncher Dec. ¶ 33; registrant who was paralyzed from the waist down, rendered impotent and confined to a wheelchair); (Gallo Dec. ¶ 10; registrant who was in a vegetative state as a result of

injuries).

When given the opportunity to do so, the courts have recognized that certain categories of sex offenders raise special considerations and may not be appropriate for community notification. For example, in applying New Jersey's notification law, the courts there have recognized that circumstances pertaining to the particular offender may have more bearing than the fact of the underlying conviction. In *In re Registrant J.G.*,169 N.J. 304, 337 (2001), the Court held that special considerations may need to be taken into account in cases where the offender was a child at the time of his offense. The Court concluded that "[i]n many instances, sexually improper behavior by such young children is more a reflection of inadequate adult supervision, immaturity, inappropriate media exposure, or a prior history of emotional abuse than it is of irremediable sexually predatory inclinations." *Id.* at 340. Thus, the court stressed that the offender's young age must be taken into account in any risk assessment, and provided a mechanism by which such offenders can apply to be excused from the requirements of Megan's Law. *Id.* at 333-34, 340.

Courts have also recognized that widespread community notification – potentially for the remainder of the offender's life – may be inappropriate where the underlying offense involved an immature young adult having consensual sexual relations with an underage teenage girlfriend. *See* Johnson Dec. ¶ 7; Donovan Aff. ¶ 13; *In re Registrant E.I.*, 300 N.J. Super. 519, 526 (App. Div. 1997). As the *E.I.* court noted, a "mechanical" application of a notification law to all cases will "impede [its] beneficial purpose." *Id.* at 526.

Similarly, there has been a recognition that it is important to consider the *nature* of the risk presented by the offender. In *In re Registrant R.F.*, 317 N.J. Super. 379 (App. Div. 1998), *approved in part, disapproved, in part, on other grounds*, *In re Registrant M.F.*, 169 N.J. 45 (2000), the Appellate Division concluded that a registrant who limited his offending behavior to a victim within his own household, and did not seek out victims in the community-at-large, may not present a risk of the type community notification is designed to address.[6] Thus, no community notification may be necessary in such a case. *Id.* at 392.[7] Similarly, where an offender has no history of offending against children, and has not otherwise shown any inclination towards such conduct, there is little reason to provide community notification to day care centers and elementary schools. *See In re Registrant M.F.*, 169 N.J. 45, 63 (2001); (Lane Dec. ¶ 9.).

The number of sex offenders who fall within these low-risk subcategories, or otherwise present little risk of reoffending, is not small. In New Jersey, for example, prosecutors opt not to seek notification in approximately one-third of the cases that fall under the statute. (Buncher Dec. ¶ 22.) Had New Jersey adopted an offense-based system, these low risk offenders – of whom there are over two thousand – would have been subjected to unnecessary

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[6]Publication of an intra-familial offender's name may also bring embarrassment and additional harm on that offender's family member/victim.

[7]This ruling is bolstered by many studies which have concluded that incest offenders present little risk of reoffense. *See, e.g.*, CSOM, *Recidivism of Sex Offenders* (May 2001) (citing study which found a 4% rate of recidivism for incest offenders).

community notification.

In summary, experience has shown that sex offenders are a highly heterogeneous group, and that this diverse group includes many offenders who present little or no risk of reoffense. Inundating the public with notification concerning these thousands of low risk offenders only frustrates the goals that community notification is designed to serve. Such over-broad notification is especially egregious when one considers the harsh consequences – the vigilantism (or fear of it), the harassment, the loss of housing and employment – that registrants suffer when subjected to Megan's Law notification. (*See* Brief of *Amici* Office of the Public Defender for the State of New Jersey, *et al.*, filed in *Smith v. Doe* (No. 01-729).)

B. Appropriate Procedures Can Be Implemented To Classify Registrants According to Risk, And These Procedures Are Not Unduly Burdensome.

The experiences of the states which have adopted a risk-based approach demonstrate that efficient procedures can be implemented both to classify registrants according to risk, and to provide those offenders an opportunity to be heard concerning the proposed classification. Consider, for example, the experience of New Jersey – the state that is generally recognized as the birthplace of community notification laws.

New Jersey's Megan's Law was enacted in October 1994. Persons convicted, adjudicated delinquent, or found not guilty by reason of insanity of a "sex offense" are subject to its requirements. N.J. Stat. Ann. 2C:7-2. The law

includes persons who committed less serious offenses that resulted only in a sentence of probation, as well as offenders who at the time of sentencing were found, by the court and/or the expert who examined them, to require treatment in New Jersey's sex offender treatment facility.

The registration aspect of Megan's Law requires that "repetitive, compulsive" sex offenders register every ninety days; all other sex offenders must register annually. The extent of community notification for a given registrant depends on his determined risk of reoffense. For high risk ("Tier 3") registrants, notices are distributed to private residences, businesses, school and community organizations in the area(s) where the offender lives and works. For moderate risk ("Tier 2") registrants, notices are provided to schools and community organizations in those areas. Notification concerning low risk ("Tier 1") offenders is provided only to local law enforcement.

In 2001, New Jersey enacted the Internet Registry Act. N. J. Stat. Ann. 2C:7-12 *et seq.* Under this new statute, Tier 3 offenders and certain Tier 2 offenders have identifying information about them placed on the web site that is available to the general public. Currently, notification is disseminated pursuant to both the original notification procedure and the recently established Internet registry web site.

All registrants are assessed by a county prosecutor to determine their risk of reoffense. In making that determination, the prosecutor utilizes New Jersey's Risk Assessment Scale ("RAS"). (Buncher Dec. Ex. A.) The RAS is a matrix of thirteen static and variable risk factors which are weighted according to their relative predictive

value.[8] The thirteen factors in the RAS are evaluated and assigned a point score by the prosecutor. The combined point total from all the RAS factors determines the registrant's tier classification.

Most of the RAS categories can be scored based upon a review of the registrant's criminal history and treatment records. For a few of the factors – primarily the "Community Support" factors at the bottom of the scale – the prosecutor will often rely upon information obtained from the registrant at the time of his last registration. With this information available, an attorney or paralegal who is familiar with the RAS can calculate a registrant's point total

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[8]Actuarial risk assessment tools are frequently relied upon to help quantify the risk presented by a particular sex offender. Two actuarial scales commonly used throughout the United States and Canada are the Static-99 and the MnSOST-R. In a number of decisions arising from Megan's Law matters and civil commitment proceedings, courts have approved the use of actuarial instruments as part of an individualized risk assessment. *See, e.g., In re Registrant C.A.*, 147 N.J. 71, 105 (1996) ("the State has produced sufficient evidence to convince us that the factors used in the [actuarial] Scale are reliable predictors of recidivism and are weighted according to their relative effectiveness as predictors";) *In re the Commitment of R.S.*, 339 N.J. Super. 507, 545 (App. Div. 2001) ("actuarial instruments are an accepted and advancing method of helping to assess risk of recidivism among sex offenders",) *aff'd*, 173 N.J. 134 (2002); *Commonwealth v. Rodriguez*, 2001 WL 303058 (Mass. Super. 2001) ("Statistical risk prediction scales, developed from regression analysis and using multiple variables that have been shown to be correlated with sexual recidivism, have substantially greater predictive validity than clinical judgment."); *In re Detention of Strauss*, 20 P.3d 1022, 1025 (Wa. Ct. App. 2001) ("Scientific literature and secondary legal authority also supports the view that the relevant scientific community generally accepts the three actuarial instruments in question as part of overall risk assessment."), *review granted, In re Detention of Thorell*, 45 P.3d 534 (Wa. 2002).

and resulting tier classification in just a few minutes.

The widespread use of the RAS in New Jersey has streamlined the risk assessment process and resulted in greater uniformity throughout the State.

As originally enacted, Megan's Law did not provide registrants any opportunity to challenge the tier classification or community notification proposed by the prosecutor. However, in *Doe v. Poritz*, 142 N.J. 1 (1995), the New Jersey Supreme Court held that due process requires that registrants who are deemed subject to either Tier 3 or Tier 2 notification be afforded the opportunity for judicial review of the prosecutor's determination.

Under the procedures in place since *Doe v. Poritz*, a registrant classified as Tier 3 or Tier 2 is served with a notice which advises him of his proposed classification and his right to judicial review. The notice includes a court date on which his matter will be heard and advises him of his opportunity to apply for a court-appointed attorney. (Buncher Dec. ¶ 11.)

Many registrants do not exercise their right to judicial review. According to a June 2001 report issued by New Jersey's Administrative Office of the Courts ("AOC Report"), 37% of the registrants who had the opportunity for judicial review defaulted. (Buncher Dec. Ex. B at 16.)

For the registrants who do pursue a challenge, they, or their attorneys, are provided with copies of the papers relied on by the State to support the proposed tier classification. These papers will include the RAS completed by the prosecutor's office. (Buncher Dec. ¶ 13.)

Prior to or at the initial conference, the registrant will advise the court and the prosecutor of the bases for his objections to the proposed classification. These objections will typically focus on particular categories of the RAS. According to the AOC Report, "for the most part registrants objected to only one or two factors" on the RAS. (Buncher Dec. Ex. B at 22.)

In most New Jersey counties, there is a single judge designated to hear Megan's Law tier classification matters. Typically, that judge will set aside a few hours one day each month for Megan's Law hearings.

Many cases are resolved, either through a settlement or a hearing, at the initial conference. However, for good cause, the court may grant a short adjournment and set a new date for the hearing. (Buncher Dec. ¶ 16.)

Most cases settle. In many instances, a registrant is able to bring to the attention of the prosecutor new information that supports a finding of a reduced level of risk. For example, the registrant may be able to show that he is doing well in sex offender treatment, is steadily employed, or is complying with the requirements of Community Supervision for Life (New Jersey's parole-like supervision of convicted sex offenders). In other instances, a settlement is reached based upon a showing that the registrant's case is of a type which has been recognized as not requiring community notification, such as where the registrant is an incest offender and there is no indication he is a threat to the community-at-large. In some instances, after evaluating the discovery, counsel for the registrant will concede there are no grounds for challenging the State's tier classification. (Buncher Dec. ¶ 17.)

For the cases that do not settle, the attorneys for the registrant will work with him to obtain information relevant to his case. In a small percentage of cases, this will include having the registrant evaluated by an expert psychologist who will render an opinion concerning the degree and nature of risk presented by the registrant. In New Jersey, an expert report may be submitted only with the permission of the court, based upon a showing that the RAS fails to adequately take into account significant aspects of the registrant's character or prior offense. *In re Registrant G.B.*, 147 N.J. 62, 87 (1996). The State will typically have the option of obtaining its own expert, but this rarely occurs. The experts retained in these matters are generally viewed as credible, and few cases degenerate into a "battle of the experts." (Buncher Dec. ¶ 18.)

For the few cases that proceed to a hearing, the hearing is usually quite brief. These matters are generally heard "on the papers," without any live witnesses, and are usually concluded in well under an hour. Generally, the court will render an oral decision on the record at the conclusion of the hearing. Appeals from the trial court's ruling are relatively rare, and most appeals are concluded quite quickly – usually within two or three weeks of the trial court's ruling. New Jersey's intermediate-level appellate court generally does not accept briefs in these cases, conducts the oral arguments by telephone, and usually issues an order deciding the appeal the same day the case is argued. (Buncher Dec. ¶¶ 19-20.)

The procedures just described have been used to process thousands of cases in New Jersey. As of March 1, 2001, 5,720 New Jersey registrants had been assigned tiers. Of that group, 3,332 registrants were classified by the

prosecutor as either Tier 3 or Tier 2. Of these registrants, 2,686 had been notified of their classification and the opportunity for judicial review. (Buncher Dec. Ex. B at 14.) 1,569 cases were resolved after a conference or hearing. (Buncher Dec. Ex. B at 17.)

For approximately one out of every three New Jersey sex offenders evaluated by the State, the State concludes at the outset, (*i.e.*, before any challenge is filed by the registrant), that there is a low risk that the registrant will reoffend. (Buncher Dec. ¶ 22.) Based on that finding, the State does not seek any community notification for these registrants. No notice or hearing is required in such cases. (Buncher Dec. ¶ 22.)

Other jurisdictions have adopted a number of different approaches to risk classification and attending due process procedures. Like New Jersey, Minnesota uses a three-tier classification system. (Gallo Dec. ¶ 3.) However, the classification is typically performed by an administrative body – the "End of Confinement Review Committee" – which utilizes the MnSOST-R actuarial scale to arrive at a presumptive risk classification. (Gallo Dec. ¶¶ 4-5.) The registrant is given the opportunity to appear before that body and present evidence, and may appeal any adverse decision to an administrative law judge. (Gallo Dec. ¶¶ 5, 12.) In Massachusetts, a risk classification hearing is conducted before an administrative body, and any appeals from those decisions are filed in state court. (Donovan Aff. ¶ 9.) In New York, an administrative board, using a risk assessment instrument, makes an initial risk classification recommendation, and the registrant is then entitled to a judicial hearing concerning the classification. (Johnson Dec. ¶¶ 5, 8.)

Thus, a considerable range of options are available in terms of the procedures by which sex offender assessments may be efficiently performed and reviewed. Judges, administrative bodies and attorneys throughout the United States have become expert in rationally classifying offenders according to their relative likelihood of reoffense. When appropriately performed, these assessments are founded upon consideration of risk factors whose predictive validity has been tested and established, and provide important information to the court that may be relevant to the case.

C. Notice and Hearing Requirements Provide an Essential Safeguard.

It is essential that offenders be provided the opportunity to object to a proposed risk classification and present evidence in their favor. In many instances, because of the availability of a due process hearing, registrants have been able to show that clear errors were made in their cases which impacted on the ultimate decision of whether, or to what extent, community notification should be disseminated.

Perhaps the most dramatic examples of this are the cases where it was shown that the client was not even subject to the community notification statute. The question of whether a given offender has committed a "sex offense" under the statute can be complicated, particularly in cases where the underlying offense is from another jurisdiction. In a number of cases, counsel for registrants have successfully shown that an error was made in classifying the offender as a Megan's Law registrant. (Buncher Dec. ¶ 26, "In at least sixteen cases, [the New Jersey Public Defender's] Office has successfully shown that an error was made in classifying the offender as a Megan's Law registrant."); (Gallo Dec. ¶ 7,

explaining that in Minnesota, there are 3-5 cases per year where it is established that the notification statute was mistakenly applied to the offender); (Donovan Aff. ¶ 20, citing two cases in Massachusetts in which the offender was relieved of the obligation to register); (Lane Dec. ¶ 6, "In a small number of cases [in Ohio], it has been demonstrated that the client is not even subject to the statute."). As a result, these persons were relieved of any obligation to register and were exempted from community notification.[9]

More commonly, due process review results in a change in the registrant's tier classification and/or a modification of the proposed notification. In New Jersey, for example, registrants frequently prevail in their challenges to the tier classification proposed by the prosecutor – of the 1,569 total cases disposed of following a conference or hearing, in 436 cases (28%), the initial tier 2 or tier 3 designation was changed by the court. (Buncher Dec. Ex. B at 16). Similar rates of success can be seen in some of the other states that adopted due process procedures. (Donovan Aff. ¶ 20, "In 27% of cases tried before the SORB, pre-hearing risk level determinations by the board were reduced"); (Gallo Dec. ¶ 8, "In about 15% of all cases, the incorrect [actuarial] score results in a registrant's score falling into a different presumptive level of risk.").

In many cases, counsel is able to establish that the offender presents a low risk, and therefore should not be subject to community notification. These cases include a

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[9]These cases belie petitioners' claim (Pet. Br. at 38) that the relief afforded to the plaintiffs in this matter will have no impact on the "plus" factor identified by the court of appeals (*i.e.*, the registration requirements).

wide variety of issues, such as errors in numerical calculations on an actuarial scale, inadvertent failure of the state to follow its own guidelines, or a failure to obtain or consider relevant information bearing upon the registrant's risk (*e.g.*, records establishing recent employment or treatment). The following are just a few representative examples.

In the matter of D.M., the registrant was able to establish from information contained in the discovery that the underlying offense was intra-familial, and therefore of a low risk nature. D.M. also provided evidence that he had a good record of employment and residential supervision. In light of this new information, D.M. was deemed a low risk, and not subject to community notification. (Buncher Dec. ¶ 32.)

Registrant D.D. was an 18 year-old Central American high school student studying in New Jersey. D.D. had a consensual sexual relationship with a 15 year-old girl who attended the same school. The prosecutor scored the RAS incorrectly, basing her determination on records of another individual with the same name. When this error was brought to the prosecutor's attention, the state decided not to seek community notification. (Buncher Dec. ¶ 29.)

In Massachusetts, "evidentiary hearings serve the critical function of distinguishing offenders more likely to reoffend from those less likely or not at all likely to reoffend." (Donovan Aff. ¶ 13.) They have seen cases where the Sex Offender Registry Board mistakenly believed that the offender had been convicted of raping a child, or overlooked a prior evaluation of the offender which concluded that he presented a low risk of reoffense.

(Donovan Aff. ¶ 18.) Without the opportunity for review, these offenders would have been subjected to unnecessary notification.

In New York, the classification board assessed points against an offender based on his "refusal" to participate in therapy. Counsel for the registrant was able to show that no sex offender treatment programs were offered in the institutions where the registrant was incarcerated, and the tier classification was lowered. (Johnson Dec. ¶ 7.) In another case, counsel established that registrant was not in denial, and had taken responsibility for his offense while in treatment. (Johnson Dec. ¶ 9.)[10]

In addition to ensuring that tier determinations are based upon a fair assessment of complete and accurate information, the availability of a due process hearing has resulted in a more nuanced understanding of sex offender risk assessment. As noted above, in a number of decisions, courts have identified types of offenses or offenders for whom community notification may not be appropriate. *See cases cited in section I.A., supra.*

The foregoing illustrates that providing registrants with a meaningful opportunity to participate in the risk assessment process helps to ensure that the ultimate determination is rational, and based on an accurate and complete assessment of the facts. *See Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980) ("the two central concerns of procedural due process [are] the prevention of unjustified or

[10]The declaration submitted by New York counsel also cites a number of examples of cases in which the opportunity for judicial review worked to the state's advantage. (Johnson Dec. ¶ 11.)

mistaken deprivations and the promotion of participation and dialogue by affected individuals in the decision making process"); *Carey v. Piphus*, 435 U.S. 247, 259 (1978) ("Procedural due process rules are meant to protect persons not from the deprivation, but from the mistaken or unjustified deprivation of life, liberty, or property.").

CONCLUSION

Based upon the foregoing, *amicus curiae* respectfully requests that the judgment of the court of appeals be affirmed.

Respectfully submitted,

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